(9) (8)

Nos. 92-8894 & 92-9049

Supreme Court, U.S.
FILED
DEC 6 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

CLARENCE VICTOR, PETITIONER

v.

STATE OF NEBRASKA

ALFRED ARTHUR SANDOVAL, PETITIONER

v.

STATE OF CALIFORNIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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34 pp

QUESTION PRESENTED

Whether the jury instructions given in these cases on the meaning of reasonable doubt violated the Due Process Clause.

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INTEREST OF THE UNITED STATES

The Due Process Clause requires the government to prove a defendant's guilt beyond a reasonable doubt in every criminal case. The question of how the reasonable doubt standard should be presented to the jury will therefore affect every federal prosecution tried to a jury.

STATEMENT

1. *Victor* v. *Nebraska*. Clarence Victor was convicted by a jury of murder in the first degree and was sentenced to death. The Nebraska Supreme Court affirmed petitioner's conviction and sentence on direct appeal, 457 N.W.2d 431 (1990), and this Court denied certiorari, 498 U.S. 1127 (1991). Victor then sought post-conviction relief, which was denied first by the trial court and then by the Nebraska Supreme Court. 494 N.W.2d 565 (1993). This Court granted Victor's petition for a writ of certiorari on September 28, 1993. J.A. 44.

At trial, the court instructed the jury on the meaning of reasonable doubt as follows, J.A. 11 (Ninth Instruction):

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

2. *Sandoval* v. *California*. Alfred Arthur Sandoval was convicted by a jury on four counts of first degree murder and on one count of attempted murder. The jury sentenced him to death on one murder count and to life imprisonment without the possibility of parole on the remaining murder counts. The California Supreme Court affirmed petitioner's convictions and sentence. J.A. 95-149. This Court granted the petition for a writ of certiorari on September 28, 1993, and consolidated the case with *Victor* v. *Nebraska*, No. 92-8894. J.A. 151.

At the guilt phase, the trial court instructed the jury on the meaning of reasonable doubt as follows, J.A. 49:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

At the penalty phase, the court similarly instructed the jury as follows, J.A. 93:

As to any crime or criminal act of which defendant is accused as a factor in aggravation, he is presumed innocent until the contrary is proved beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of any crime or criminal acts of which defendant is accused used an aggravating factor.

SUMMARY OF ARGUMENT

A. Due process does not require "reasonable doubt" to be defined for juries. There has long been disagreement over the wisdom of attempting to define the term. This Court has said that attempts to explain the concept of reasonable doubt ordinarily do not clarify it for the jury, and authorities such as Dean Wigmore have concluded that attempted definitions add nothing to the jury's understanding of the term and may be confusing.

B. Where courts choose to define reasonable doubt, the Constitution does not require that a particular jury instruction be given. Rather, due process tolerates a broad range of definitions. This Court has approved definitions that characterize "reasonable doubt" as "a doubt based on reason" and that define "proof beyond a reasonable doubt" as proof to a "moral certainty." The lower federal courts traditionally have given trial courts broad latitude to define reasonable doubt, and some of them have drafted

model jury instructions, all of which differ to some degree, and all of which permissibly define the term.

C. The jury instructions in this case do not run afoul of *Cage* v. *Louisiana*, 498 U.S. 39 (1990). The principal vice of the jury instruction denounced in *Cage* was the language equating a "reasonable doubt" with a "substantial" doubt and with a "grave" doubt. Neither the instruction used in *Victor* v. *Nebraska* nor the instruction given in *Sandoval* v. *California* made that erroneous equation. The use of the term "moral certainty" was disapproved in *Cage*, but the use of that term, in proper context, is not error. This Court's pre-*Cage* precedents have approved the use of that term, and it is likely that, if anything, jurors interpret that phrase to impose a heightened standard for reasonable doubt, not a lower one.

ARGUMENT

THE JURY INSTRUCTIONS GIVEN IN THESE CASES ON THE MEANING OF REASONABLE DOUBT DID NOT VIOLATE THE DUE PROCESS CLAUSE

Under the Due Process Clause, no one may be convicted of a crime except upon proof beyond a reasonable doubt of every element of a charged offense. *In re Winship*, 397 U.S. 358 (1970); *Jackson* v. *Virginia*, 443 U.S. 307 (1979). The question in these cases is whether the jury instructions on the meaning of the term "reasonable doubt" violated the Due Process Clause by lightening the prosecution's burden of proof. In our view, the instructions did not have that effect.

Proper analysis of this case involves three questions: The first question is whether the Due Process

Clause requires a trial court to define the reasonable doubt standard for the jury. The second is how large a range of definitions the Due Process Clause will tolerate. The third is whether the jury instructions given here fell beyond that range. In particular, the issue is whether the Court's per curiam opinion in *Cage* v. *Louisiana*, 498 U.S. 39 (1990), requires that the judgments below be set aside.

A. The Due Process Clause Does Not Require A Trial Court To Define For The Jury The Meaning Of "Reasonable Doubt"

1. The rule that criminal defendants must be found guilty beyond a reasonable doubt "dates at least from our early years as a Nation." *In re Winship*, 397 U.S. at 361; accord *Apodaca* v. *Oregon*, 406 U.S. 404, 412-413 & n.6 (1972) (plurality opinion).[1] By contrast, there has emerged no settled view that reasonable doubt must be defined for juries. See, *e.g.*, 9 J. Wigmore, *Evidence* § 2497, at 405 (J. Chadbourn rev. ed. 1981); 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.8(f), at 80 (1986). During the 19th century, some courts attempted to define reasonable doubt, while others concluded that it was unwise to do so. Compare, *e.g.*, *Commonwealth* v. *Costley*, 118 Mass. 1, 24 (1875) (attempting to define reasonable doubt) (Gray, C.J.), with *State* v. *Sauer*, 38 N.W. 355, 356 (Minn. 1888) ("The term

[1] In this country, the reasonable doubt rule dates back perhaps as far as 1770 and received widespread application by the mid-19th century. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. Rev. 507, 515-524 (1975); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1301-1302 & n.9 (1977).

'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply.") (Mitchell, J.); see *State* v. *Ostrander*, 18 Iowa 435, 458-459 (1865).

This Court's precedents dispel any notion that the Constitution requires a court to define reasonable doubt for the jury. In *Miles* v. *United States*, 103 U.S. 304, 312 (1880), the Court stated that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." The Court has reaffirmed that view on several occasions. See *Holland* v. *United States*, 348 U.S. 121, 140 (1954); *Dunbar* v. *United States*, 156 U.S. 185, 199 (1895); see also *Hopt* v. *Utah*, 120 U.S. 430, 440 (1887) ("an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt [has] often been held sufficient, without further explanation").

2. Some authorities from earlier in this century hold (or state in dictum) that it is error for a trial court not to define reasonable doubt for the jury. See *Friedman* v. *United States*, 381 F.2d 155, 160 (8th Cir. 1967) (dictum); *Williams* v. *United States*, 271 F.2d 703, 705 (4th Cir. 1959) (dictum); *Blatt* v. *United States*, 60 F.2d 481, 481 (3d Cir. 1932); *Nanfito* v. *United States*, 20 F.2d 376, 378 (8th Cir. 1927); *Schencks* v. *United States*, 2 F.2d 185, 187 (D.C. Cir. 1924). That view, however, is not the modern understanding.

The current state of the law in the federal system is as follows: Three circuits take the view that the trial judge should not define reasonable doubt for the jury, since the definition is likely to add little to the jury's understanding of the concept and may in some instances lead to jury confusion. See *United States* v.

Glass, 846 F.2d 386, 387 (7th Cir. 1988);[2] *United States* v. *Moss*, 756 F.2d 329, 333 (4th Cir. 1985);[3] *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1060-1061 (5th Cir.), cert. denied, 483 U.S. 1035 (1987). Five other courts of appeals have held that it is not error for a district court to refrain from defining a "reasonable doubt." See *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993);[4] *United States* v. *Nolasco*, 926 F.2d 869, 872 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Olmstead*, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988); *United States* v. *Ivic*, 700 F.2d 51, 68-69 (2d Cir. 1983); cf. *Whiteside* v. *Parke*, 705 F.2d 869, 871-873 (6th Cir.), cert. denied,

[2] The Seventh Circuit has pattern jury instructions that do not define reasonable doubt and recommend against doing so. The Seventh Circuit's instructions state that "[t]he Committee recommends that no instruction be given defining 'reasonable doubt.' The phrase 'reasonable doubt' is self-explanatory and is its own best definition. Further elaboration [tends to] weaken and make imprecise the existing phrase." *Federal Criminal Jury Instructions of the Seventh Circuit* 2.07 (1980).

[3] The Fourth and Seventh Circuits are split as to whether reasonable doubt should be defined if the jury asks the court to do so. Compare *United States* v. *Russell*, 971 F.2d 1098, 1108 (4th Cir. 1992) (court should define if jury is "demonstrably confused or uncertain"), cert. denied, 113 S. Ct. 1013 (1993), with *United States* v. *Blackburn*, 992 F.2d 666, 668 (7th Cir.) (court should refuse jury requests for definition), cert. denied, 114 S. Ct. 393 (1993).

[4] The D.C. Circuit has expressly repudiated its earlier position. See *United States* v. *Taylor*, 997 F.2d at 1558 ("[W]e are now of the opinion that the greater wisdom may lie with the Fourth Circuit's and Seventh Circuit's instruction to leave to juries the task of deliberating the meaning of reasonable doubt.").

464 U.S. 843 (1983). In light of these more recent developments, the older decisions expressing the view that it is error not to define reasonable doubt are now of questionable authority.[5]

3. As the debate among the authorities strongly suggests, a trial court's refusal to define reasonable doubt does not violate due process, because it does not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1922), quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977). Even more today than in the past, the concept of reasonable doubt has become familiar to laymen throughout our society and ordinarily does not need embellishment by a court. As Judge Posner has noted, "deeply entrenched in the popular culture as it is, the term 'beyond a reasonable doubt' may be the single legal term that jurors understand best." *United States* v. *Hall*, 854 F.2d 1036, 1044 (7th Cir. 1988) (concurring opinion). Professor McCormick has made the same observation, stating that "[r]easonable doubt is a term in common use almost as familiar to jurors as to lawyers." 2 C. McCormick, *Evidence* § 341, at 447 (J. Strong ed. 4th ed. 1992).

The American Law Institute did not define reasonable doubt in the Model Penal Code, because it be-

[5] In addition, the relevant statements in *Friedman* and *Williams* are dicta, *Nanfito* and *Blatt* also relied on other bases for reversal, and *Schencks* is no longer good law. See page 8, note 4, *supra*. And, in any event, none of the early decisions cited above expressly based their analysis on the Constitution—as opposed to the federal common law governing jury instructions—so those decisions offer little by way of enlightenment regarding the requirements of due process.

lieved that definition of the standard "can add nothing helpful to the phrase." Model Penal Code § 1.12, Comment 190 (1985). Dean Wigmore likewise condemned the practice of giving elaborate definitions of reasonable doubt as "a useless one" that "should be abandoned." J. Wigmore § 2497, at 408-409.[6] See also, *e.g.*, *United States* v. *Ivic*, 700 F.2d at 69 (Friendly, J.) ("a century's experience has confirmed the wisdom of the Supreme Court's observation" in *Miles* that reasonable doubt definitions are unhelpful); C. McCormick § 341, at 447 ("It is an ancient maxim that all definitions are dangerous.").[7] Under

[6] Dean Wigmore explained: "[W]hen anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be rather confusion, or, at the least, a continued incomprehension. In practice, these detailed amplifications of the doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or to save a cause for a new trial by quibbling, on appeal, over the verbal propriety of a form of words uttered or declined to be uttered by the judge. The effort to perpetuate and develop these elaborate unserviceable definitions is a useless one, and serves today chiefly to aid the purposes of the tactician. It should be abandoned." J. Wigmore § 2497, at 406-409.

[7] There is no consensus in the psychological literature about the impact of reasonable doubt instructions upon jury verdicts. See Kerr, Atkin, Stasser, Meek, Holt & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. Personality & Soc. Psychology 282, 291 (1976) ("mock jurors' verdicts may indeed be affected by a judge's instructions concerning reasonable doubt"). But see Cornish & Sealy, *Juries and the Rules of Evidence*, 1973 Crim. L. Rev. 208, 222 (variations in reasonable doubt instructions had "little effect" upon

these circumstances, it cannot be said that a trial court's decision not to instruct the jury on the meaning of reasonable doubt violates any principle fundamental to the fair operation of a criminal justice system under our Constitution.

B. The Due Process Clause Tolerates A Range Of Definitions Of "Reasonable Doubt"

Since the Due Process Clause does not require courts to define reasonable doubt for a jury, it follows that there is no single definition that is constitutionally required. At the same time, the Due Process Clause does not forbid trial courts from defining a reasonable doubt; the history discussed above shows that there has never been a consensus that it is improper for trial courts to define reasonable doubt for the jury. We submit, therefore, that when a trial court instructs a jury as to the meaning of reasonable doubt, the court may select from a broad range of acceptable definitions. See C. McCormick § 341, at 447 (a reasonable doubt definition is proper if "in terms *locally approved*.") (emphasis added); *Becher* v. *United States*, 5 F.2d 45, 51 (2d Cir. 1924) (L. Hand, J.) ("It is enough if it appears that the jury has been told that the prosecu-

simulated jury verdicts). Compare also Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 Law & Soc'y Rev. 153, 189-191 (1982) (instructions improved juror comprehension, but not application, of reasonable doubt standard); Kramer & Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J.L. Ref. 401, 414 (1990) (instructions "did little" to improve juror understanding of certain aspects of the meaning of reasonable doubt).

tion must establish all the facts to the required degree of satisfaction of the jury, and there is no fixed way in which this need be communicated, so long as that idea is evident."), cert. denied, 267 U.S. 602 (1925). We believe that the Constitution requires only that, "taken as a whole, the instructions correctly convey[] the concept of reasonable doubt to the jury." *Holland* v. *United States*, 348 U.S. at 140.

Many attempts have been made to define reasonable doubt. The most famous and influential early attempt appeared in *Commonwealth* v. *Webster*, 59 Mass. (5 Cush.) 295, 320 (1850), where Chief Justice Shaw defined a reasonable doubt as follows:

> [W]hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. * * * [T]he evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt * * *.

Over the years since then, this Court has recited or approved a variety of formulations defining reasonable doubt. In *Jackson* v. *Virginia*, 443 U.S. at 317, the Court said that "[a] 'reasonable doubt,' at

a minimum, is one based upon 'reason.'" Accord *Johnson* v. *Louisiana*, 406 U.S. 356, 360 (1972). In *Hopt* v. *Utah*, *supra*, the charge to the jury stated that "a reasonable doubt is a doubt based on reason" and that the defendant should be found not guilty "upon any reasonable hypothesis consistent with the defendant's innocence." 120 U.S. at 439. The charge also told the jury that if "you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt." *Ibid.* The Court upheld that jury instruction, calling it "as just a guide to practical men as can well be given; and if it were open to criticism it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence they should do so." *Id.* at 441. The Court specifically approved the "own affairs" portion of the instruction. See *id.* at 439.

In *Dunbar* v. *United States*, *supra*, the trial court told the jury, "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt." 156 U.S. at 199. Of that instruction, this Court stated that "it gave all the definition of reasonable doubt which a court can be

required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done." *Ibid.*

The Court upheld another instruction in *Holland* v. *United States*, *supra*. There, the trial court instructed the jury that reasonable doubt is "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." 348 U.S. at 140. Although this Court was of the view that "the charge should have been in terms of the kind of doubt that would make a person hesitate to act," *ibid.*, it concluded that "the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." *Ibid.*[5]

Several federal courts of appeals have adopted pattern jury instructions defining the term "reasonable doubt." The pattern instructions adopted by the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits are reprinted in the appendix to this brief. Although the District of Columbia Circuit has noted with approval the practice of not defining a reasonable doubt for the jury, *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993), that court also has approved the use of the District of Columbia's Criminal Jury Instructions; that jury instruction also is reprinted in the attached appendix.

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[5] In *Taylor* v. *Kentucky*, 436 U.S. 478, 488 (1978), the Court criticized a trial court's definition of reasonable doubt as "a substantial doubt, a real doubt." Calling that definition "truncated," "confusing," and "hardly a model of clarity," the *Taylor* Court nonetheless allowed that the instruction was "perhaps not in itself reversible error." *Ibid.* The adequacy of the trial court's definition of reasonable doubt, however, was not at issue in *Taylor*.

The pattern instructions adopted by the courts of appeals differ somewhat from one to the next, but there has been no suggestion by this Court or any of the courts of appeals that only one formulation is permissible and the others constitute reversible error. To the contrary, whether following pattern instructions or acting on their own, trial courts have traditionally been given wide latitude to define "reasonable doubt," and the courts of appeals have repeatedly rejected challenges to varying definitions of that term. See, *e.g.*, *United States* v. *Edelin*, 996 F.2d 1238, 1242-1243 (D.C. Cir. 1993) (not "a speculation or suspicion"); *United States* v. *Dale*, 991 F.2d 819, 853 (D.C. Cir.) ("a doubt for which you can give a reason"), cert. denied, 114 S. Ct. 286 (1993); *Watkins* v. *Ponte*, 987 F.2d 27, 31-32 (1st Cir. 1993) (not "foolish" or "fanciful" doubt); *United States* v. *Daniels*, 986 F.2d 451, 457 (11th Cir. 1993) ("a real doubt"); *United States* v. *Harris*, 974 F.2d 84, 85 (8th Cir. 1992) ("not the mere possibility of innocence"); *United States* v. *Polan*, 970 F.2d 1280, 1286 (3d Cir. 1992) (an "honest doubt" and "not a fanciful doubt"), cert. denied, 113 S. Ct. 1367 (1993); *United States* v. *Barrera-Gonzales*, 952 F.2d 1269, 1273 (10th Cir. 1992) ("a real possibility that [the defendant] is not guilty"); *Gaskins* v. *McKellar*, 916 F.2d 941, 952 (4th Cir. 1990) ("a substantial doubt" not "some imaginary doubt or some slight doubt"), cert. denied, 111 S. Ct. 2277 (1991); *Leecan* v. *Lopes*, 893 F.2d 1434, 1443 (2d Cir.) ("a doubt for which a reasonable man can give a valid reason" and "one founded on the evidence"), cert. denied, 496 U.S. 929 (1990); *United States* v. *Jorge*, 865 F.2d 6, 10 (1st Cir.) ("not a doubt suggested by the ingenuity of counsel"), cert. denied, 490 U.S. 1027

(1989); *United States* v. *Hall*, 854 F.2d 1036, 1038-1039 (7th Cir. 1988) (a "fair doubt as one 'based on reason and common sense'"); *Smith* v. *Bordenkircher*, 718 F.2d 1273, 1276-1277 (4th Cir. 1983) (a "good and substantial doubt" not "a mere vague, fanciful or imaginary doubt"), cert. denied, 466 U.S. 976 (1984); *United States* v. *Regilio*, 669 F.2d 1169, 1178 (7th Cir.) ("a doubt that is based on reason"), cert. denied, 457 U.S. 1133 (1982); *Bumpus* v. *Gunter*, 635 F.2d 907, 910 (1st Cir. 1980) ("a doubt in your mind that you can stand up in the jury room and argue with principle and integrity to your fellow jurors"), cert. denied, 450 U.S. 1003 (1981).

The wide range of instructions that have been upheld against constitutional challenge demonstrates that due process does not require the adoption of a single fixed model instruction on reasonable doubt, and that, in fact, the Due Process Clause permits the use of any formulation that does not manifestly undermine the level of firm confidence that jurors must have before they may find a fellow citizen guilty of a crime.

C. This Court's Decision in *Cage* v. *Louisiana* Does Not Require Reversal Of The Judgments Below

The petitioners in both *Victor* and *Sandoval* rely heavily on the Court's 1990 per curiam decision in *Cage* v. *Louisiana*, 498 U.S. 39, as the basis for reversal. In *Cage*, the jury was instructed that a reasonable doubt was "such doubt as would give rise to a grave uncertainty," that a reasonable doubt was "an actual substantial doubt," and that what was necessary to convict the defendant was a "moral

certainty" of his guilt. *Id.* at 40.[9] This Court reversed Cage's conviction, determining that "a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 41. The Court's decision in *Cage* does not control these cases, however, for several reasons.

1. The instructions given in these two cases have in common with the instruction given in *Cage* the use of the term "moral certainty" as part of the definition of reasonable doubt. *Cage*, however, should not be read to hold that a reference to "moral certainty," by itself, renders a reasonable doubt instruction unconstitutional. The primary culprit in the jury instruction denounced in *Cage* was the equation of "reasonable doubt" with "substantial doubt" and "grave uncertainty." 498 U.S. at 41 ("It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard."). The reference to "moral certainty" was criticized because it operated in conjunction with the references to substantial and

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[9] The instruction in *Cage* defined a reasonable doubt as

> "one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*."

498 U.S. at 40 (quoting 554 So. 2d 39, 41 (La. 1989); emphasis added by this Court).

grave doubt. *Ibid.* ("When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear" that the instruction violates due process).

Reference to "moral certainty" has long been a standard component of jury instructions defining the concept of reasonable doubt. The use of that term, without more, has not been thought to suggest to the jury that the government has a reduced burden of proof. In fact, in common parlance a level of confidence "to a moral certainty" would ordinarily be viewed as even more exacting than a level of confidence "beyond a reasonable doubt." The use of the term "moral certainty" in defining reasonable doubt therefore does not *ipso facto* violate due process.

During the 18th and 19th centuries, the term "moral certainty" came to mean that, in the realm of human affairs, absolute certainty is not attainable. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.J. 153, 192 (1986) ("Thus by the late eighteenth century the concepts of moral certainty and proof beyond a reasonable doubt were tightly linked together in the philosophical literature, in the legal treatises, and in discussions of law designed to reach the educated public."); Morano, 55 B.U.L. Rev. at 512. The influential 1850 decision by Chief Justice Shaw of the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Webster*, *supra*, referred to "moral certainty" to express a very high degree of confidence, but less than absolute certainty. See also *Donnelly* v. *State*, 26 N.J.L. 601, 615 (1857); *State* v. *Hammonds*, 85 S.E.2d 133, 138 (N.C. 1954).

As the *Webster* case illustrates, jurists in the 19th century came to regard the phrases "to a moral certainty" and "beyond a reasonable doubt" as synonymous. See *Fidelity Mutual Life Ass'n* v. *Mettler*, 185 U.S. 308, 317 (1902) ("[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt' "); *Hopt* v. *Utah*, 120 U.S. at 440 (same). Nor has the term lost that meaning in its modern usage. See *Schneble* v. *Florida*, 405 U.S. 427, 431 (1972) (equating "to a moral certainty" with "beyond a reasonable doubt" as a standard of guilt). This Court recently used the term "moral certainty" to denote a very high level of confidence. *City of Canton* v. *Harris*, 489 U.S. 378, 390 n.10 (1989); *McCleskey* v. *Kemp*, 481 U.S. 279, 308 n.29 (1987); see also *Brewer* v. *Williams*, 430 U.S. 387, 433-434 (1977) (White, J., dissenting).

This Court's precedents reflect and confirm the historical acceptance of the use of the term "moral certainty" in reasonable doubt instructions. In *Miles* v. *United States*, the Court reviewed a charge using the term "moral certainty." 103 U.S. at 309. The Court sustained that instruction, saying that "[t]he language used * * * was certainly very favorable to the accused, and is sustained by respectable authority." *Id.* at 312. In *Wilson* v. *United States*, 232 U.S. 563 (1914), the defendants objected to the trial court's definition of reasonable doubt in terms of moral certainty. See *id.* at 569-570. The trial court instructed the jury that, *id.* at 570:

> "[R]easonable doubt is that frame of mind which forbids you to say, all the evidence considered and weighed, 'I have an abiding conviction of the defendants' guilt' or as it has been

> expressed, 'I am convinced of the defendants' guilt to a moral certainty.' If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be guilty. On the contrary, if that is your frame of mind, if you are in the frame of mind where if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate, before acting, then you have a reasonable doubt."

This Court upheld that instruction, stating that "[t]he argument here is that the instruction as given is faulty, because the court did not tell the jury that the Government must prove its case against defendants beyond a reasonable doubt. As we read the charge, it meant nothing less than that, and was sufficiently favorable to defendants." *Ibid.* See also *Perovich* v. *United States*, 205 U.S. 86, 92 (1907) (approving the instruction given in *Commonwealth* v. *Webster*, *supra*); *Agnew* v. *United States*, 165 U.S. 36, 51 (1897) (quoting, with apparent approval, an instruction defining reasonable doubt as "such a doubt arising from the evidence that leaves the minds of the jury in such a state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused").

2. If it is constitutionally permissible to use the phrase "moral certainty" to define reasonable doubt, the judgment in *Sandoval* v. *California*, No. 92-9049, should be affirmed. The jury instruction in that case used the phrase "moral certainty," but not in conjunction with the other terms that this Court found fatal to the instruction given in *Cage*. The *Sandoval* jury instruction is therefore consistent with this Court's decisions in cases such as *Miles*, *Hopt*, and *Wilson*, and is not rendered constitutionally invalid under this Court's analysis in *Cage*.

The jury instruction in *Victor* v. *Nebraska*, No. 92-8894, more closely resembles the one given in *Cage*. Nonetheless, a close reading of the instructions in those two cases reveals two critical differences. First, the instruction in *Victor* did not refer to reasonable doubt as requiring "grave uncertainty," as did the jury charge in *Cage*. That distinction is an important one. Requiring jurors to convict unless they entertain a "grave uncertainty" about a defendant's guilt is likely to persuade the jury that more than a "'doubt' * * * based upon 'reason,'" *Jackson* v. *Virginia*, 443 U.S. at 317, is necessary to return a not guilty verdict.

Second, while the jury charge in *Victor* contained the "actual and substantial doubt" phrase used in the *Cage* jury charge, the instruction in *Victor* did not use that phrase independently. Rather, the jury instruction in *Victor* referred to "an actual and substantial doubt" only as part of a sentence that drew a contrast between such a doubt and one "arising from mere possibility, from bare imagination, or from fanciful conjecture." The context in which the phrase "actual and substantial doubt" was used is important. A lawyer might interpret the term "substantial" as referring to the "substantial evidence" standard that is commonly used in administrative law, see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), but lay jurors are not likely to interpret the term in that manner. Instead, they are likely to construe the term "substantial," in the context of the *Victor* instruction, as referring to a doubt based on the evidence of record, because that term was contrasted with a doubt "arising from mere possibility, from

bare imagination, or from fanciful conjecture." So construed, the instruction in *Victor* does not run afoul of the Court's decision in *Cage*.

3. Finally, the Court's analysis in *Cage* may have been affected by what the Court has subsequently recognized as an incorrect standard of review. During the Term before *Cage* was decided, this Court in *Boyde* v. *California* 494 U.S. 370, 378-381 (1990), adopted a standard for reviewing jury instructions. The proper inquiry, the Court held, is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in" an unconstitutional manner. *Id.* at 380. In so ruling, the Court expressly rejected use of the standard applied in *Francis* v. *Franklin*, 471 U.S. 307 (1985), which asked whether a jury "could have" misapplied the instructions. 494 U.S. at 378. In *Cage*, however, the Court applied the standard of review that it had first articulated in *Francis*, but then had later rejected in *Boyde*. 498 U.S. at 41 ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. *Francis* v. *Franklin*, 471 U.S. 307, 316 (1985)."). The Term after *Cage*, the Court recognized that it had applied the wrong standard of review in that case, and it reaffirmed that the standard of review articulated in *Boyde* is the correct one. *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 n.4 (1991). Thus, particularly when the instructions in these cases are analyzed under the proper standard of review, *Cage* cannot be said to require reversal of petitioners' convictions.

CONCLUSION

The judgments of the Supreme Court of Nebraska and the Supreme Court of California should be affirmed.

Respectfully submitted.

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DECEMBER 1993

APPENDIX

Several courts of appeals have pattern jury instructions defining the reasonable doubt standard. The Fifth Circuit's definition is as follow:

> A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

U.S. Fifth Circuit District Judges Ass'n, *Pattern Jury Instructions, Criminal Cases* 1.06 (1990). See also *United States* v. *Alonzo*, 681 F.2d 997 (5th Cir.), cert. denied, 459 U.S. 1021 (1982) (approving that instruction).

The Sixth Circuit's definition is as follows:

> (4) * * * Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. * * *
>
> (5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. * * *

U.S. Sixth Circuit District Judges Ass'n, *Pattern Criminal Jury Instructions* 1.03 (1991). See also *United States* v. *Goodlett*, 3 F.3d 976, 979 (6th Cir. 1993) (expressing approval of that instruction).

The Eighth Circuit's definition is as follows:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 3.11 (1922).

The Ninth Circuit's definition is as follows:

> A reasonable doubt is a doubt based upon reason and common sense, * * *. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.

Manual of Model Criminal Instructions for the Ninth Circuit 3.03 (1992).

The Eleventh Circuit's definition is as follows:

> A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your affairs.

U.S. Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions, Criminal Cases* 3 (1985). See also *United States* v. *Daniels*, 986 F.2d 451, 456 (11th

Cir. 1993) (upholding instruction that "closely tracks" this language). The Eleventh Circuit's definition is identical to the Fifth Circuit's with the exception of the word "real" before "doubt" in the first sentence.

According to the District of Columbia's "Red Book":

> Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty or a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

Young Lawyers Section of the Bar Association of the District of Columbia, *Criminal Jury Instructions* 2.09 (3d ed. 1978). See also *United States* v. *Dale*, 991 F.2d 819, 853 (D.C. Cir.) (upholding use of that instruction), cert. denied, 114 S. Ct. 286 (1993).

The leading treatise on federal jury instructions defines reasonable doubt as follows:

> It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt

based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

1 E. Devitt, C. Blackmar, M. Wolff & K. O'Malley, *Federal Jury Practice and Instructions* § 12.10, at 354 (4th ed. 1992).

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